Single Bench 1 (4)
C.F. (100)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

W. P. NO.3962 OF 2004

PETITIONER

P.R. No. 3952/04
Presented by Shri A. Farooqui Khan
dated 18/10/04

Dr. R. J. P. Verma, S/o Late Shri Baijnath Sahai, aged About 58 years, Occupation-Service, presently posted as E. N. T. Specialist, District Hospital, Rajnandgaon, Distt. Rajnandgaon [Chhattisgarh]

VERSUS

RESPONDENTS

1. State of Chhattisgarh through The Secretary, Department of Health & Family Welfare, Mantralaya, Dau Kalyan Singh Bhawan, Raipur [CG]

18.10.04

2. State of Madhya Pradesh through Secretary, Department of Health & Family Welfare, Vallabh Bhawan, Bhopal (M.P)

3. Director, Health Services, Chhattisgarh, Raipur [CG]

WRIT PETITION UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF WRIT IN NATURE OF CERTIORARI, MANDAMUS PROHIBITION AND OTHER SUITABLE WRIT OR WRITS, DIRECTION OR DIRECTIONS, ORDER OR ORDERS:

(P94)

HIGH COURT OF CHHATTISGARH AT BILASPUR

W.P. NO. 3962 OF 2004

PETITIONER : DR. R.J.P. VERMA

VERSUS

RESPONDENTS : STATE OF C.G. AND OTHERS

Post for pronouncement of order on 17-1-2007.

Sd/-
DHIRENDRA MISHRA
Judge

(195)

HIGH COURT OF CHHATTISGARH AT BILASPUR

W.P. NO. 3962 OF 2004

PETITIONER : DR. R.J.P. VERMA

VERSUS

RESPONDENTS : STATE OF C.G. AND OTHERS

Shri Manindra Shrivastava learned Sr. Counsel with Shri Amrito Das for the petitioner.

Shri U.N.S. Deo, GA for the State.

O R D E R
(17.01.2007)

Dhirendra Mishra.J

The petitioner by the instant petition under Article 226 of the Constitution of India has prayed for a direction to the respondents to consider his case for promotion to the post of Chief Medical and Health Officer on immediate basis and in the event of being found fit grant promotion with effect from 1.11.1989 with all consequential benefits and to further consider his case for promotion to the post of Joint Director treating him to be Chief Medical and Health Officer with effect from 1.11.1989 and to further grant him promotion with effect from due date with all consequential benefits such as perks, seniority and due fixation in appropriate higher scale corresponding to the higher post.

2. Grievance of the petitioner is that he was selected as Assistant Surgeon through P.S.C. on 26.5.1970. Thereafter, he was selected for the Post Graduate Course (ENT) in the year 1978. The respondents vide order dated 15.6.1983 gave ad hoc promotion to three of his junior doctors as E.N.T. specialist. Petitioner filed Writ Petition bearing No. M.P. 835/1987 against his supersession in the year 1987 in the High Court of Madhya Pradesh. Petition stood transferred to M.P. State Administrative Tribunal as T.A. No. 1331/1988. The Tribunal vide order dated 9.8.1991 of Annexure P-1 allowed the petition and directed the respondents to consider the case of the petitioner for promotion to the post of Surgical Specialist (E.N.T.) as on 15.6.1983 when his juniors were promoted and if found fit he be placed above his immediate juniors. It was further directed that the petitioner shall be entitled for all consequential benefits of promotion such as arrears of pay, seniority etc. as also for further promotion on the basis of such seniority.

3. The State Government did not comply with the above direction of the M.P. State Administrative Tribunal. The petitioner filed contempt petition being M.A. No. 47/1992. Respondents/State also filed an application for review being M.A. No. 348/1992 of the order dated 9.8.1991. In the meanwhile, 16 candidates were directly recruited as Chief Medical Officers on 12.1.1993. They were later promoted as Joint Directors on 25.6.1996 and few amongst them were promoted as Directors in the month of March 1998. All the direct recruits were junior to

the petitioner since the petitioner ought to have been promoted as Chief Medical Officer with effect from 1.11.1989.

4. The contempt petition preferred by the petitioner as also the review petition preferred by the State Government were disposed of by the M.P. State Administrative Tribunal vide order of Annexure P-2 on 27.8.1997. By this order review petition M.A. No. 348/1992 was dismissed on the ground that the same was filed after the period of limitation without assigning any cogent reason or sufficient ground and the respondents were directed to implement the order and directions dated 9.8.1991 vide Annexure P-1 within a period of three months from the date of passing of the above order. Consequently, the petitioner was given ad hoc promotion to the post of Specialist with effect from 15.6.1983 and it was also directed that in compliance of the Tribunal's order arrears of pay, seniority and promotion etc. as per the entitlement shall be applicable in the same way which are applicable to the employees promoted on ad hoc basis. However, the respondents placed the petitioner below Mr. A.K. Verma in the gradation list of the specialists published on 4.6.1988. He also moved contempt petition being M.A. No. 217/1998 before the State Administrative Tribunal complaining that the order of the State Administrative Tribunal has not been fully complied with. In the meanwhile, the petitioner made representations before the respondents detailing all his grievances that he has been denied the benefit of promotion despite specific directions of the State Administrative Tribunal. In the meanwhile, seniority list of Chief Medical Officers as on 1.11.1989 as also the list of Joint Directors fixing

their seniority were published in the year 2001-2002 and ultimately vide order dated 3.5.2006 the petitioner was promoted to the post of Chief Medical Officer and was given pro forma promotion with effect from 1.11.1989.

5. Respondents 1 and 3 in their reply submitted that after reorganization of the State services of the petitioner were allocated to the State of Chhattisgarh. Prior to formation of State of Chhattisgarh Departmental Promotion proceedings were to be initiated by the State of Madhya Pradesh. However, respondent No.1 vide order dated 2.5.2006 vide annexure R-1(1) accepting the recommendations of the Departmental Promotion Committee of Madhya Pradesh State Health and Family Welfare Department in its review meeting dated 7.4.2005, promoted the petitioner to the post of Deputy Director temporarily until further orders with effect from 1.11.1989 on the basis of "no work no pay". The order mentions that seniority of the petitioner will be fixed on the basis of the promotion order dated 25.1.1991 and in view of the order of Annexure R-1(1) dated 2.5.2006 by which the petitioner has been promoted, grievance of the petitioner stands redressed.

6. Learned counsel for the petitioner submits that the order of Annexure P-1 passed by the State Administrative Tribunal has attained finality as the review petition preferred by the State Government was dismissed by the Tribunal vide order of Annexure P-2. He further submits that in view of the directions contained in Annexure P-1 the respondents were duty bound to consider the case of the petitioner for promotion with

effect from 15.6.1983 and thereafter if he found fit they ought to have been placed him above his immediate juniors and the petitioner was entitled for consequential benefits of promotion such as arrears of pay, seniority etc. as also for further promotion on the basis of seniority if found fit and suitable for further promotion. However, case of the petitioner for promotion was considered only on 23.12.1997 when he was promoted to the post of Specialist. Consequential benefits such has seniority and promotion to the subsequent post on the basis of such seniority, case of the petitioner for promotion to the subsequent post on the basis of seniority has not been considered though his juniors and the doctors who were directly recruited after the promotion of the petitioner in the year 1993 have been promoted to the post of Joint Director and some have been promoted to the post of Director. In the aforesaid circumstances case of the petitioner for subsequent promotion to the higher post on the basis of his seniority should be considered and if found fit, he should be given pro forma promotion and all consequential benefits of such promotion for which he is lawfully entitled.

7. On the other hand learned counsel for the respondents/State submits that the case of the petitioner for promotion could be considered by the erstwhile State of Madhya Pradesh. As per the recommendations of the Review Departmental Promotion Committee of the erstwhile State of Madhya Pradesh dated 7.4.2005 the promotion order of Annexure R-1(1) was passed on 2.5.2006 and in view of the above promotion order the

grievance of the petitioner stood redressed and the instant petition has become infructuous.

8. I have heard learned counsel for the parties.

9. Case of the petitioner before the State Administrative Tribunal was that he was selected by the P.S.C. as Assistant Surgeon in the year 1983. His appointment is made under Rule 11 and 12 of M.P. Health (Gazetted) Service Recruitment Rules 1967 according to which the qualification for the next higher post of specialist is master's degree in the subject with five years experience as per schedule 2 and 3 of the recruitment rules. Keeping in view the requirement of the specialists, Assistant Surgeons including the petitioner working in the state of Madhya Pradesh were selected for post graduate degree and he did his post graduation in the E.N.T. in the year 1978. However, the State promoted his juniors on ad hoc basis against the rules without preparing select list on merit cum seniority basis. The application was allowed and the respondents were directed to consider the petitioner's case for promotion to the post of surgical specialist in E.N.T. as on 15.6.1983 when his juniors were promoted and if found fit he be placed above his immediate juniors. It was also directed that he shall be entitled for all consequential benefits of promotion such as arrears of pay, seniority etc. and also for further promotion on the basis of seniority and if found fit and suitable for further promotion also. The petitioner preferred contempt petition for non compliance of the above order of the Tribunal. The State also preferred review petition before the Tribunal against the order of Annexure P-1.

10. From the perusal of the order passed in the contempt and review petition it appears that ground taken by the petitioner for reviewing the order was that post of specialist is to be filled by direct recruitment only as per the recruitment rules of 1967. Vide order dated 15.6.1983 the State promoted certain doctors on ad hoc basis to the post of specialist as Stop Gap Arrangement and the petitioner cannot claim appointment on ad hoc basis as a matter of right. Rejecting the review petition of the State on the ground of limitation the Tribunal observed that the order of Annexure P-1 where the respondents were directed to promote the petitioner, the word "promoted" was to be read and understood as "promoted on ad hoc basis" and with these observations the review petition was dismissed and the respondents were directed to implement the order of Annexure P-1 within a period of three months from the date of this order. From Annexures P-1 and P-2 it is manifestly clear that the Tribunal thought it fit to consider the petitioner for ad hoc promotion to the post of specialist as the other three similarly placed doctors who were given promotion on ad hoc basis on the principle that there is no justification for differential treatment between the persons of same class or same category. The order of the Tribunal was implemented by the State though belatedly when the petitioner was promoted on ad hoc basis to the post of specialist with effect from 15.6.1983 vide order dated 23.12.1997 Annexure P-3. There is no dispute that the promotion of the petitioner to the post of specialist is only on ad hoc basis though the petitioner has claimed that later on promotion was regularised and the name of the petitioner was published in the gradation

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list of specialists on 4.6.1998. However, no document has been filed by the petitioner to demonstrate that ad hoc promotion given to the petitioner to the post of specialist was subsequently regularised.

11. It is not in dispute that recruitment to the post of specialist at the relevant time was governed by M.P. Health Service Recruitment Rules 1967 (Rule for brevity) framed under Article 309 of the Constitution of India. As per this rule of 1967 appointment to the post of specialist was only between direct recruits and there was no promotional channel to the post of specialist.

12. The method of recruitment is given in Rule 6. Rule 6(1) (a) provides for the method of direct recruitment. Rule (b) provides for recruitment by promotion of the members of the service as specified in the schedule. Rule (c) provides by transfer of persons who hold posts in different branches of the service which may be specified in Schedule (1). Rule 5 provides for classification of the service, scale of pay and the number of posts included in the service and as per this rule there were 26 posts of specialist available with the then State of Madhya Pradesh. Schedule 2 under Rule 6 makes a provision that all the 26 posts of specialist are to be filled in 100 per cent by direct recruitment and there was no promotional channel to the post of specialist.

13. In the matter of **Keshav Chandra Joshi and others Vs. Union of India and others** reported **in 1992 Supp. (1) SCC 272** it has been held that a person may be held to be appointed to a substantive post when his appointment to the service is as per the provisions of the Rules and to

become member of the service he must satisfy two conditions, namely, the appointment must be in substantive capacity and the appointment has to be to the post in the service according to rules and within the quota to a substantive vacancy. Further dealing as to when promotees become members of the promotional post to the substantive capacity and secondly whether the entire length of service from the date of initial appointment should be counted towards their seniority, it has been held that where the selection is in defiance of and de hors of rules on ad hoc basis or on temporary or stop gap basis can not be taken into account for the purpose of seniority, even if the appointee was subsequently qualified to hold the post on a regular basis. The previous promotion would be regular only from the date of vacancy within the quota and seniority shall be counted from that date and not from the date of his earlier promotion or subsequent confirmation. It has been underlined that in order to do justice to the promotees it would not be proper to do injustice to the direct recruits. The rule of quota being a statutory one it must be strictly implemented and it is impermissible for the authorities concerned to deviate from the rule due to administrative exigencies or expediency. Adhering to the ratio laid down in the matter of *Direct Recruit Class II Engineering Officers' Association Vs. State of Maharashtra and others* reported in *(1990) 2 SCC 715* it has been held thus:

> (A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as stop gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

B. If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.

14. In the matter of **D. Ganesh Rao Patnaik and others Vs. State of Jharkhand and others** reported **in AIR 2005 SC 4321** the Supreme Court has held that where quota of direct recruits is lying vacant it is not proper if the same is filled up by promotion and in these circumstances the promotees who are promoted against quota of direct recruits cannot claim to be senior to the direct recruits.

15. The Constitution Bench of the Supreme Court in the matter of **Secretary, State of Karnataka and others Vs. Umadevi and others** reported in **(2006) 4 SCC 1** considering the cases of irregular appointment in paragraph 43 has held that where appointment is made by duly qualified persons in duly sanctioned vacant posts and such appointee continues to work for 10 years or more but without orders of intervention of courts or of tribunals, their regularisation may be considered on merits and the State Governments and their instrumentalities should be directed to take steps to regularise as a one-time measure, the services of such irregularly appointed, who have worked for 10 years or more in duly

sanctioned. However, it was made clear that continuance in the said post should not be under cover or orders of the courts or tribunals. Referring to case of *Rai Shivendra Bahadur (Dr.) Vs. Governing Body of the Nalanda College* reported in *1962 Supp (2) SCR 144*, it has further been held by the Supreme Court that in order that a mandamus may be issued to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it.

16. If we examine this matter in the light of above judgments of the Supreme Court, it is manifestly clear that promotion of the petitioner to the post of specialist was de hors to the recruitment rules applicable to the petitioner and the same was made as per the direction of the Administrative Tribunal purely on ad hoc basis with effect from 1983. Subsequent promotion given to the petitioner during the pendency of this petition was also as per the directions and the order of the tribunal/ court. Therefore, this Court is of the considered opinion that petitioner cannot seek a relief of subsequent promotion by considering his seniority w.e.f 1.11.1989 the date from which he was given pro forma promotion to the post of Deputy Director, Health vide order of Annexure R-1 (1).

17. In the result the petition being without substance is liable to be dismissed and it is accordingly dismissed. No order as to costs.

Sd/-
DHIRENDRA MISHRA
Judge